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AF 3727

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TRANSMITTAL FORM (to be used for all correspondence after initial filing)		Application Number	09/708,766
		Filing Date	November 7, 2000
		First Named Inventor	James F. GAUSLING
		Art Unit	3727
		Examiner Name	S. Cronin
Total Number of Pages in This Submission	46	Attorney Docket Number	430672000101

ENCLOSURES (Check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) (17 pages) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Attachment 1 (3 pages) Attachment 2 (3 pages) Attachment 3 (22 pages) Return Receipt Postcard
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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT			
Firm Name	MORRISON & FOERSTER LLP (Customer No. 25226)		
Signature			
Printed name	Rick Shoop		
Date	April 18, 2005	Reg. No.	45,763

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Dated: April 18, 2005	Signature: (Georgina Matos)

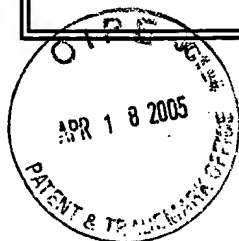
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Dated: April 18, 2005

Signature: _____

(Georgina Matos)

Docket No.: 430672000101
(PATENT)



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Patent Application of:

James F. GAUSLING and Stacey L. MORAN

Application No.: 09/708,766

Technology Center: 3700

Filed: November 7, 2000

Art Unit: 3727

For: ERGONOMIC BOOKPACK

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is in response to the rejection of claims 1-26 in a Non-Final Office Action mailed on March 23, 2004 (Paper No. 14). A Notice of Appeal, compliant with then-effective 37 CFR 1.191, was timely filed on December 20, 2002. This Brief is further filed in response to a Notification of Non-Compliant Appeal Brief mailed March 17, 2005.

Under 37 CFR 41.31(a)(1) an applicant may appeal from a decision of the examiner where any of the applicant's claims have been "twice rejected." Under that Rule, this Brief is to be considered an initial Appeal Brief filed under 37 CFR 41.37. However, at the time when prosecution was earlier reopened "after an appeal ...brief has been filed...", 37 CFR 1.193(b)(2)(ii) was then the effective Rule relating to continuation of that appeal. Specifically, in such an instance, to avoid abandonment of the application, the Rule required the appellant specifically to make such a

request to reinstate the appeal and concurrently to file a Supplemental Appeal Brief. Such a Supplemental Appeal Brief must still comply with 37 CFR 41.37.

Consequently, Appellants contingently request that, if appropriate or necessary for: 1.) consideration of this Appeal, 2.) avoiding abandonment of the application, and 3.) otherwise for the purpose of complying with 37 CFR 193(b)(2)(ii), please reinstate the appeal and consider this Appeal Brief a Supplemental Appeal Brief.

Any required petition for extension of time for filing this Appeal Brief and associated fees is dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This Brief is organized using the headings specified in 37 CFR 41.37. The Notice of Non-Compliant Appeal Brief noted that rejections other than those recited in the Non-Final Office Action mailed March 23, 2004 (Paper No. 14), have been withdrawn.

Additionally, the new Office Action has raised objections to the drawings under 37 C.F.R. 1.83(a). Such objections cannot be subject matter in this appeal, but since a reply to the objection must be made to prevent abandonment of the application and yet no amendments are allowed under 37 CFR 1.193(b)(2)(ii), a proffered reply is attached to this Supplemental Brief as Attachment I. Appellants will file the attached reply if then needed when the application resumes *ex parte* prosecution.

I. REAL PARTY IN INTEREST

The real party in interest for this appeal is:

ZERO g TECHNOLOGIES, Inc.

II. RELATED APPEALS AND INTERFERENCES

There are currently no other appeals or interferences that would directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

However, a continuation of this application, having Serial No. 10/161,300, is in *ex parte* prosecution. An Appeal Brief was filed in that application on October 1, 2004.

III. STATUS OF CLAIMS**Total Number of Claims in Application**

There are 26 claims pending in application. A true copy of the claims on appeal is included in the Appendix as Attachment 2.

Current Status of Claims

Claims canceled: None

Claims withdrawn from consideration but not canceled: None

Claims pending: 1-26

Claims allowed: None

Claims rejected: 1-22 and 24-26

Claims objected to as depending from rejected claim: claim 23

Claims indicated to be allowable if 35 USC 112, paragraph two questions resolved:
25 and 26

Claims On Appeal

The claims on appeal are claims 1-22 and 24-26

IV. STATUS OF AMENDMENTS

An Amendment under 37 CFR 1.116 was filed on December 20, 2002 (Paper No. 10) but was not entered per an Advisory Action dated March 7, 2003 (Paper No. 11) as raising “new issues that would require further consideration,” more specifically that “the amended claims require further search and consideration since the dependency of claims 2-7 are now from newly independent claims.”

No amendment has been filed in response to the non-Final Office Action, dated March 23, 2004 (Paper No.14), because of the prohibition under 37 CFR 1.193 (b)(2)(ii) when renewing an appeal.

V. SUMMARY OF CLAIMED SUBJECT MATTER

This patent application may be best explained as directed to a backpack that is supported from the wearer’s shoulders by straps that are attached to the backpack body in such a way that the center of gravity of the backpack is shifted inwardly and closer to a wearer’s back. Pressure from the weight of the pack is more evenly distributed on that wearer’s back and shoulders.

Figure 9 in the application shows the conceptual advantages of the pack. The backpack body 200 includes, in the depicted variation, shoulder straps 300 that are attached to the body of the pack in such a way that top straps or members 600, working alone or in conjunction with top support members 640, act through the points of attachment to the backpack to “redirect the forces acting along the shoulder straps 300 along the top straps 600, again reducing the load placed on the wearer’s shoulders.” See page 25 of the application.

Again, in concept, the application includes a number of backpack structures that improve the comfort of the backpack by shifting the center of gravity towards the back of the wearer.

There are a number of different ways in which this desired function is accomplished. The variation found in independent claims 1, 8, and 15 require that the shoulder support strapping be attached to the backpack body at a junction between a “top region” and an “outer region”. The explanation of what a “region” is with respect to the described backpack may be found beginning at

about page 4 as that material explain Figure 2. That material explains that a backpack body may have a “topside or region 202” and “an outer side or region 208” and where those regions are located.

Independent Claim 1

This claim recites a backpack body -- examples are shown in Figures 2 and 3 as number 200. See also page 5, line 8 to page 6, line 13. The backpack body (200) is better shown in its improved usage in Figure 9. The other component(s) in the claim are shoulder support members (300) connected to the pack body at the juncture between the outer region of the pack and the top region of the pack through straps (600 and 640). The terms top region (202) and outer region (208) are also discussed at page 5, line 8 to page 6, line 13 with regard to Figure 3.

Independent Claim 8

This claim is similar to claim 1 with explanation of the constituent backpack body and support members found at the same place. The claim adds a hip belt to the combination. It is discussed at page 19, line 12 to page 20, line 2.

Independent Claim 15

This claim is similar to claim 1 excepting that the backpack body comprises a “plurality of straps.” This version of the backpack body is shown in Figure 8 and is explained at page 20, lines 11-17.

General Comment

The three independent claims do not contain any “means-plus-function” limitations.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A concise statement of the grounds of rejection presented for review on appeal:

- 1.) Whether claims 3, 12, 25, and 26 are appropriately rejected under 35 USC 112, first paragraph, as failing to comply with the written description requirement.
- 2.) Whether claims 3, 12, 25, and 26 are appropriately rejected under 35 USC 112, second paragraph, as indefinite or incomplete.
- 3.) Whether claims 1, 3, 4, 5, and 15 are appropriately rejected under 35 USC 102(e) as being anticipated by U.S. Patent No. 6,130,616, to Sizemore.
- 4.) Whether claims 1-4 and 6-20 are appropriately rejected under 35 USC 102(e) as being anticipated by U.S. Patent No. 6,024,265, to Clements.
- 5.) Whether claims 1, 3, 6, 7, 15, and 17 are appropriately rejected under 35 USC 102(b) as being anticipated by Floyd, Great Britain Patent No. 1400.
- 6.) Whether claims 1, 2, 6, 7, 10, 14, 15, 17, 18, 21, 22, and 24 are appropriately rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 14, 16, 18, and 19 of US Patent No. 6,164,509.
- 7.) Whether claims 4, 5, and 13 are appropriately rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of US Patent No. 6,164,509 in view of Sizemore.

VII. ARGUMENTS

1.) 35 USC § 112, first paragraph

Claims 3, 12, 25, and 26 stand rejected under 35 USC 112, first paragraph, as failing to comply with the written description requirement. In support of the rejection the Office Action states:

“The claims contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art

that the inventors, at the time the application was filed, had possession of the claimed invention. There is no disclosure on how to make the backpack seamless and there is insufficient disclosure for the distal ends of the shoulder support members connected to each other.”

Appellants disagree with the rejection both as insufficiently explained and as legally improper.

First of all, claims 3 and 12 are original claims. The word “seamless” is found both in claim 3 and in claim 12, but not in claim 25 or 26. The warmly remembered CCPA concluded many times that “an original claim is its own written description.” See *In re Gardner*, 475 F.2d 1389, 177 USPQ 396, *pet. for reh'g. and recon. denied*, 480 F.2d 879, 178 USPQ 149 (1973); *In re Wertheim et al*, 541 F.2d 257, 191 USPQ 90, 96 (CCPA 1976). In the absence of any evidence that Appellants have rejected the claimed “seamless” backpack as their invention, the CCPA-invoked presumption that originally claimed material is Appellants’ invention prevails over the conclusively stated rejection that they were not in “possession” of “the claimed invention.”

This is sufficient basis upon which to reverse the rejection of originally filed claims 3 and 12. Such a reversal is requested.

Secondly, even the recent cases often considered most harsh on patentees and applicants in dealing with the written description requirement¹, requires that those challenging the sufficiency of a claim, be those persons patent examiners or patent infringement defendants, must come forward with some indicia, some evidence, tending to show that the claimed invention is not described. Indeed, the *Wertheim* case cited just above starkly states: “The burden of showing that the claimed invention is not described in the specification rests upon the PTO in the first instance, and it is up to the PTO to give reasons why a description not *in ipsius verbis* is insufficient.” 541 F.2d @ 265.

Here, the rejection states but a conclusion: “there is insufficient disclosure...” without any evidence or argument to back up the conclusion. The “burden of showing” has not been carried

¹ See, *Gentry Gallery v Berkline*, 134 F.3d 1473, 45 USPQ 2d 1498 (Fed. Cir. 1998) and the *ex parte* cases cited therein.

forward by “the PTO in the first instance.” Consequently, Appellants’ presumption of correctness has not been overcome.

Claims 25 and 26

Again, this is a “written description” requirement rejection. The PTO is under the constraint of showing why one would consider the claimed structure not to be Appellants’ invention in more than a conclusion in a rejection. The rejection is not sufficient under this section of the Patent Law.

Nevertheless, Appellants will withdraw the appeal of claims 25 and 26 under 35 USC 112, paragraph one, if the remainder of the rejections are reversed.

Reversal of the rejection of claims 3, 12, 25, and 26 is requested.

2.) 35 USC § 112, second paragraph

Claims 3, 12, 25, and 26 stand rejected under 35 USC § 112, second paragraph, as indefinite. In support of the rejection the Office Action states:

“Claims 3 and 12 are indefinite since it is unclear how the backpack would be made seamless.

“Claim 25 is rejected to under 35 USC 112, second paragraph, as being incomplete for omitting essential structural cooperative relationships of elements, such omission amounting to a gap between the necessary structural connections. See MPEP § 2172.01. The omitted structural cooperative relationships are: the distal ends of the two shoulder support members connected to each other. The disclosure does not teach or show how this is done.

“The dependent claims not specifically mentioned are rejected as being dependent upon a rejected base claim, since they inherently contain the same deficiencies therein.”

Appellants disagree.

Claims 3 and 12

The basis for the rejection of claims 3 and 12, i.e., “unclear how the backpack would be made seamless” is legally improper under the second paragraph of 35 USC 112.

This part of the Patent Law² is to ensure that a person reading a claim, as eventually patented, is given clear notice what is covered by that claim. That is to say: the claims are OK under this law if that reader sees that a backpack must be “seamless” and understands that to infringe the claim, some allegedly infringing backpack must not have any seams. Additional thinking about: “I wonder how they do that” is not fruitful under this piece of the law. The enablement provisions (i.e., “how to make”) of the first paragraph of 35 USC 112 is where that type of evidentiary review is made. The Examiner has made no argument that the term “seamless” is unclear, only that it somehow isn’t clear how to make the claimed backpack “seamless.”

Since the Office Action did not provide any appropriate basis for supporting a rejection based upon the clarity of claims 3 and 12, the rejection should be reversed.

² 35 USC 112, paragraph 2 indicates that: “The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”

Claims 25 and 26

Claims 25 and 26 stand rejected as “indefinite” or “incomplete for omitting...relationships of elements...[specifically]...The distal ends of the two shoulder support members connected to each other.”

Appellants disagree. Appellants have not stated anywhere in this application that it is essential that the “distal ends” of the “shoulder support members” necessarily be connected to each other as a feature of the invention. Such is a variation, of course, but Appellants have not said or implied that it is an essential feature.

Even so, claim 25 (and hence depending claim 26) requires that those two ends be connected to each other. Since the specific “omission” is not in fact an omission -- the words are found in claim 25 -- it is not apparent why, even in the view proposed in the Office Action, that the claims are considered to be unclear.

Additionally, claim 25 is indicated to be “incomplete for omitting essential cooperative relationships of elements, such omission amounting of a gap between the necessary structural connection.” Again, the allegedly omitted “structural cooperative relationships” were said to be that “the distal ends of the two shoulder support members connected to each other.” Since these words are found in claim 25, Appellants are at a loss as to how to respond to the rejection, variously by argument or amendment or in some other manner, to rectify the question raised in that rejection.

A reversal of this rejection is requested.

3.) Rejections under 35 USC § 102 - Sizemore

Claims 1, 3, 4, 5, and 15 stand rejected under 35 USC 102(e) as anticipated by U.S. Patent No. 6,130,616, to Sizemore. In support of the rejection the Office Action states:

“Sizemore discloses an ergonomic backpack comprising:

- “A backpack body (1);
- “A plurality of shoulder support members (2), each having a proximal and connected to the body at first transition region (Figure 3);
- “The body comprises a single, seamless, continuous member to the degree applicant claims:
- “The backpack is comprised of nylon with a fineness between 500 denier and 1050 denier (Column 5, lines 27-28); and
- “A plurality of straps (Figures 1-3).”

Appellants disagree.

Each of the appealed independent claims requires that “each shoulder support member proximal end [be] connected to the backpack body at a first transition region between the top region of the backpack body and an outer region of the backpack body.”

The final rejection merely notes that the Sizemore backpack has a “proximal and [sic - “end”] connected to the body at a first transition region (Figure 3)...” Figure 3 appears to show a backpack of some kind -- also shown in Figures 1 and 2 -- upon which the shoulder straps are attached to a junction at the top of the backpack body near the wearer’s body. As Appellants noted above, the meaning of upper and outer and side regions is discussed in the specification. The final Office Action fails to recite the factual basis, the pictures or words, in the Sizemore patent upon which the claim elements specified by the terms “outer region” and “side region” are supposedly anticipated. The Office Action simply does not mention these terms nor does it lead to one reading that Office Action to where in the patent such a specific connecting region may be found. The reason why there Office Action is silent on this point is a simple one: Sizemore does not disclose connecting the shoulder straps to the backpack body at a region between the “outer region” and “side region.”

Moreover, in assessing the remainder of the Sizemore patent, there is no indication that the Sizemore discloses a backpack variation in which the shoulder members are attached to the backpack body anywhere else other than as shown in Figure 3.

In sum, the Sizemore patent simply does not show all of the elements found in appealed claims 1, 3, 4, 5, and 15 and does not therefore anticipate them.

A reversal of this rejection is respectfully requested.

4.) 35 USC § 102 - Clements

Claims 1, 2-4, 6, 7-9, 10, 11-13, 14, 15, 16, and 17-20 stand rejected under 35 USC 102(e) as anticipated by U.S. Pat. No. 6,024,265, to Clements. In support of the rejection the Examiner states:

“Clements discloses an ergonomic backpack comprising:

- A backpack body (1);
- A plurality of shoulder support member (11), each having a proximal end connected to the body at first transition region (Appendix A, Figure 4);
- At least one side support member (Appendix B) disposed adjacent a lateral side region having a proximal end connected to the backpack body at a second transition region between the outer region and the lateral side region and a distal end connected to one of the shoulder support members;
- An adjustable hip belt (12) attached to the backpack body, wherein the hip belt is comprised of two pieces, each respectively attached to a lateral side (Figures 4 and 5);
- The body comprising a single, seamless, continuous member to the degree applicant claims;
- The backpack is comprised of nylon;
- A yoke (Appendix A) disposed along the backpack body top region and connected to each shoulder support member;
- The bottom region of the backpack has a stiffness (20) higher than a stiffness of the rest of the backpack body;
- A plurality of straps (Figure 1);
- An adjustable hip belt is attached to the backpack body at one or more of the straps (Figure 1);
- The first hip belt piece is attached to a first lateral side region and the second hip belt piece is attached to a second lateral side region of the backpack body (Figures 4 and 5);
- Two side support members (Appendix B), each disposed adjacent the first and second lateral side regions, respectively, and each connected to the

- backpack body at a second transition region and a shoulder support member;
- The distal end of each shoulder support member is connected to the backpack body at a second transition region (Appendix B) between the outer region of the backpack and a lateral side region of the backpack (Figure 6), to the same degree appellant claims;
 - A plurality of straps comprising four or more straps, wherein the first two of said straps (9) are parallel to one another and wherein the other two of said straps (28) are parallel to one another and perpendicular to the first two of said straps; and
 - Each of the first two and second two straps are spaced apart from each other to define an aperture (Figure 2, enclosed by 7) through which the interior of the backpack body is accessible.

Appellants disagree.

Appellants appreciate the use of the Office Action Appendix A and Appendix B as an aid in attempting to draw a correspondence between the words in the claims and the structures in the Clements patent. Although the placement of the box marked “1st transition region” and its associated arrow entail substantial artistic license (in the claims on appeal, the “1st transition region” is between the “top region” and the “outer region” -- outer regions are positioned away from the wearer’s body) at least the source of misconstrual is understood.

However, if for the purpose of discussion, a reader reviews Clements' Figure 1 or Figure 2 and assumes that the region marked in the Office Action is an “outer region.” Clements’ shoulder strap (strap 11 in Figure 1 or 2) is attached to the backpack at two places: the first attachment is at a position adjacent the wearer’s body about three-quarters of the way up the pack and the other end is attached near the bottom of the pack. This observation of the Clement backpack structure counters the recital in the Office Action in two ways. First, these connection points are far, far away from the area designated in the Office Action as the “1st transition region.” Secondly, Appellants’ claims require the “shoulder support member” be connected to a “1st transition region,” a region between the top region and the outer region. Clements’ straps 11 do not approach the outer, upper region of the backpack.

Appellants have urged consideration of this particular difference between the claimed device and the Clements disclosure a number of times during the prosecution, including a lengthy discussion in the earlier Brief. No additional discussion has been forthcoming in an Office Action concerning this most important of points. Appellants' claim limitation relating to the site, the 1st transition region, for connection to the backpack is found in each of the independent claims (Nos. 1, 8, and 15) under rejection in this section.

There are many other differences between the claimed structure and the Clements backpack, however since the noted difference between the strap attachment points in Clements and that required by the claims is so clear, other points need not be discussed. Appellants have not conceded those additional errors in the rejection.

In sum, since Clements does not show connection of a shoulder strap at a region between an outer region and a top region, the anticipation rejection based on Clements is in error and should be reversed.

5.) 35 USC § 102 - Floyd

Claims 1, 3, 6, 7, 15, and 17 stands rejected under 35 USC 102(b) as anticipated by Great Britain Patent No. 1400, to Floyd. In support of the rejection, the Office Action notes:

“Floyd discloses an ergonomic backpack comprising:

- A backpack body (Figures 1 and 2) comprising a plurality of straps;
- A plurality of shoulder support members (c), each member having a distal end (bottom portion) and a proximal end (top portion), each proximal end connected to the backpack body at a first transition region (at buckle) between a top region (d) and an outer region (edge) of the backpack body (Figure 1);
- The backpack body is a single, seamless, continuous member, to the same degree claimed; and

- A yoke (a) disposed along the backpack body top region and connected to each shoulder support member.

Appellants disagree. As was the case with the Clemens reference, no disclosure is seen attaching the shoulder straps to a region between an outer region and a top region. Specifically, this Victorian British patent shows only the connection of the shoulder straps (“c” in the drawings) at an edge separating the top and the body side (at “d” in the drawings) or in the buckle on the top of the knapsack. Again, neither of these connections is in a region between the top region and the outer region.

Reversal is requested.

6.) Judicial Double Patenting Rejections

Claims 1, 2, 6, 7, 10, 14, 15, 17, 18, 21, 22, and 24

Claims 1, 2, 6, 7, 10, 14, 15, 17, 18, 21, 22, and 24 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 14, 16, 18, and 19 of U.S. Patent No. 6,164,509. In support of the rejection, the Office Action notes:

“Although the conflicting claims are not identical, they are not patentably distinct from each other because the claim the same subject matter”.

Appellants disagree on several bases. First of all, it is unclear how the two sets of claims -- one set from this application and one set from the ‘509 patent can claim “the same” subject matter and not be identical claims. Because the PTO has failed to follow its own procedural steps as specified in MPEP 804, Appellants have no indication of what the PTO’s logic or considerations might be in saying that the respective claims recite the same subject matter. MPEP 804 specifies that:

“... any obviousness-type double patenting rejection should make clear:

“(A) the differences between the inventions defined by the conflicting claims-
-a claim in the patent compared to a claim in the application;

“(B) the reasons why a person of ordinary skill in the art would conclude that the invention defined in the claim in issue is an obvious variation of the invention defined in a claim in the patent.”

Again, Appellants trust that this question will be addressed in the Examiner’s Answer in a way that does not simply recite a conclusion. Appellants specifically request it be done.

Secondly, in point of fact, the claims on appeal require connection to the backpack at a region between a top region and an outer region. The ‘509 patent, in contrast, requires such a connection at a region between the top region and a body-side region; the body side is not an outer region. These are very different spots on the backpack. How then do the claims somehow recite the same thing?

Reversal of this rejection is requested.

Claims 4, 5, and 13

Claims 4, 5, and 13 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,164,509 in view of Sizemore. In support of the rejection, the Office Action notes:

“The U.S. Patent No. 6,164,509 discloses all of the limitations of the claims, except the backpack body comprised of nylon or a fineness of between 500 denier and 1050 denier. However, Sizemore teaches a backpack comprised of nylon with a fineness between 500 denier and 1050 denier (Column 5, lines 27-28). It would have been obvious to make the backpack disclosed in U.S. Patent No. 6,164,509 of nylon with a fineness between 500 denier and 1050 denier, as taught by Sizemore. Doing so would provide a sturdier, more resilient backpack.”

Appellants disagree. Contrary to the bare assertion in the stated rejection, claim 1 of ‘509 does not show “all of the limitations of the claims.” Specifically, claim 1 of ‘509 does not show the required point of connection to the pack. If the Office Action truly intends to say that the patent

itself was the source of comparison (and not claim 1), then the rejection is legally improper on its face.

Sizemore does not cure the specific limitation deficiency of claim 1 of '509.

Withdrawal of the rejection is requested.

SUMMARY

The rejections recited in the non-Final Office Action are without either legal basis or are without factual support. Reversal of the rejections is completely appropriate and is requested.

In the event the U.S. Patent and Trademark office determines that an extension and/or other relief is required, applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to Deposit Account No. 03-1952 referencing docket no.430672000101. However, the Commissioner is not authorized to charge the cost of the issue fee to the Deposit Account.

Dated: April 18, 2005

Respectfully submitted,

By 

Rick Shoop

Registration No.: 45,763
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, California 94304
(650) 813-5804

Application No.: 09/708,766

18

Docket No.: 430672000101



ATTACHMENT 1



proffered amendment -- do not file

Docket No.: 430672000101
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:

James F. GAUSLING and Stacey L. MORAN

Application No.: 09/708,766

Technology Center: 3700

Filed: November 7, 2000

Art Unit: 3727

For: ERGONOMIC BOOKPACK

DRAWING AMENDMENT

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Please approve the proposed amendments made in red on the attached marked up drawing. Corresponding amendments to the specification will be made in a subsequent paper, once the drawings are approved.

Dated: September 23, 2004

Respectfully submitted,

By XXXXXX
E. Thomas Wheelock
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ATTACHMENT 2

CLAIMS ON APPEAL

1. An ergonomic backpack comprising:

a backpack body, and

a plurality of shoulder support members, each shoulder support member having a distal end and a proximal end, each shoulder support member proximal end connected to the backpack body at a first transition region between a top region of the backpack body and an outer region of the backpack body.

2. The backpack of claim 1 additionally comprising at least one side support member disposed adjacent a lateral side region of the backpack body and having a proximal end connected to the backpack body at a second transition region between the outer region and the lateral side region and a distal end connected to one of the shoulder support members.

3. The backpack of claim 1 wherein the backpack body comprises a single, seamless, continuous member.

4. The backpack of claim 1 wherein the backpack body comprises Nylon.

5. The backpack of claim 1 wherein the backpack body comprises a fineness of between about 500 denier and about 1050 denier.

6. The backpack of claim 1 additionally comprising a yoke disposed along the backpack body top region and connected to each shoulder support member.

7. The backpack of claim 1 wherein a bottom region of the backpack body has a stiffness higher than a stiffness of the rest of the backpack body.

8. An ergonomic backpack comprising:

a backpack body,

a plurality of shoulder support members, each shoulder support member having a distal end and a proximal end, each shoulder support member proximal end connected to the backpack body at a first transition region between a top region of the backpack body and an outer region of the backpack body, and

a hip belt attached to the backpack body.

9. The backpack of claim 8 wherein the hip belt comprises a first hip belt piece and a second hip belt piece, each of said first and second hip belt pieces having a distal end and a proximal end,

wherein the first hip belt piece proximal end is attached to a first lateral side region of the backpack body, the second hip belt piece proximal end is attached to a second lateral side region of the backpack body, and each of the first and second hip belt piece distal ends is configured to be releasably connectable to each other.

10. The backpack of claim 8 additionally comprising two side support members, each disposed adjacent the first and second lateral side regions, respectively, and wherein each side support member has a proximal end connected to the backpack body at a second transition region between the outer region and the lateral side region and a distal end connected to one of the shoulder support members.

11. The backpack of claim 8 wherein the hip belt is adjustable.

12. The backpack of claim 8 wherein the backpack body comprises a single, seamless, continuous member.

13. The backpack of claim 8 wherein the backpack body comprises Nylon.

14. The backpack of claim 8 additionally comprising a yoke disposed along the backpack body top region and connected to each shoulder support member.

15. An ergonomic backpack comprising:

a backpack body comprising a plurality of straps, and

a plurality of shoulder support members, each shoulder support member having a distal end and a proximal end, the shoulder support member proximal end connected to the backpack body at a first transition region between a top region of the backpack body and an outer region of the backpack body.

16. The backpack of claim 15 additionally comprising a hip belt attached to the backpack body at one or more of said straps.

17. The backpack of claim 15 additionally comprising a yoke disposed on the backpack body along one of said straps.

18. The backpack of claim 15 additionally comprising two side support members, each disposed adjacent the first and second lateral side regions, respectively, and wherein each side support member has a proximal end connected to the backpack body at a second transition region between the outer region and the lateral side region and a distal end connected to one of the shoulder support members.

19. The backpack of claim 15 wherein the plurality of straps comprises four or more straps, and wherein the first two of said straps are parallel to one another and wherein the other two of said straps are (a) parallel to one another and (b) perpendicular to the first two of said straps.

20. The backpack of claim 19 wherein each of said first two straps and second two straps are spaced apart from each other to define an aperture through which the interior of the backpack body is accessible.

21. The backpack of claim 1 wherein the distal end of each shoulder support member is connected to the backpack body at a second transition region between the outer region of the backpack and a lateral side region of the backpack body.

22. The backpack of claim 21 additionally comprising a member adapted to guide the shoulder support member along a lateral side region of the backpack body.

23. The backpack of claim 21 additionally comprising a ring attached to the lateral side region and having one of said shoulder support members threaded through said ring.

24. The backpack in claim 1 wherein the distal end of each shoulder support member is connected to the backpack body at a third transition region between the outer region of the backpack body and the bottom region of the backpack body.

25. The backpack in claim 1 having only two shoulder support members, with the distal ends of the two shoulder support members connected to each other and provides support to the lower outer region of the backpack body.

26. The backpack in claim 25 additionally comprising a plurality of rings connected to the body of the backpack and having one of said shoulder support members threaded through each ring.

ATTACHMENT 3